RECORD AND BRIEFS

No. 16-341

In The
Supreme Court of the United States

TC HEARTLAND LLC,

Petitioner,

v.

KRAFT FOOD GROUP BRANDS LLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICI CURIAE* 48 INTERNET COMPANIES, RETAILERS, AND ASSOCIATIONS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE**

Amici Curiae ("*Amici*") – 41 companies and 7 associations – submit this brief in support of Petitioner because they are all too familiar with the effects of forum shopping in patent cases, and thus support the revitalization of the specific patent venue statute, 28 U.S.C. § 1400(b).

Amici companies are: Acushnet Company; Adobe Systems Inc.; ASUS Computer International; Balsam Brands Inc.; Bass Pro Shops, LLC; Betterment Holdings, Inc.; Campmor, Inc.; Carbonite, Inc.; Christian Book Distributors, Inc.; Crutchfield Corporation; eBay Inc.; Etsy, Inc.; FedEx Corporation; HP Inc.; HTC America, Inc.; IAC/InterActiveCorp; Jockey International, Inc.; Kickstarter, Inc.; Lecorpio, LLC; L Brands, Inc.; L.L. Bean, Inc.; Macy's, Inc.; MediaFire, LLC; Minted, Inc.; NeuLion, Inc.; NetApp, Inc.; Newegg Inc.; Oracle Corporation; Overstock.com, Inc.; QVC, Inc.; Parke-Bell, Ltd.; Pegasystems Inc.; Red Hat, Inc.; Red Lion Hotels Corporation; SAS Institute Inc.; SAP America, Inc.; Symmetry LLC; VIZIO, Inc.; Walmart Stores, Inc.; Wayfair, Inc.; and Xilinx, Inc.

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* Pursuant to S. Ct. R. 37.6, counsel for *Amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to S. Ct. R. 37.3(a), counsel for *Amici* represent that Petitioner filed a general consent to the filing of *amici curiae* briefs, that Respondent consented to the filing of this brief, and that a copy of Respondent's consent is being filed with this brief.

Amici associations are: Computer and Communications Industry Association (which represents a wide range of companies in the computer, Internet, information technology, and telecommunications industries); Entertainment Software Association (which represents nearly all major U.S. publishers of computer and video games for video game consoles, handheld devices, personal computers and the Internet); The Internet Association (which consists of 40 of the world's leading Internet companies); National Retail Federation (which is the world's largest retail trade association, representing retailers from the United States and more than 45 countries); North Carolina Chamber (which is North Carolina's largest, broad-based business advocacy organization with over 35,000 members); North Carolina Technology Association (which has over 750 members and focuses on advancing North Carolina's tech industry); and The Retail Litigation Center, Inc. (which advocates in the courts for the leading retailers in the United States).

At first glance, *Amici* appear to have more differences than similarities. With corporate headquarters from Maine to California, some are long established companies, while others are start-ups. Some have brick-and-mortar stores located across the country, while others have only an Internet presence. Some sell products that they manufacture, while others sell services or software.

Amici, however, share at least one thing in common – collectively, they or their members have been sued, repeatedly, for patent infringement in one of the

handful of districts that hear the vast majority of all patent cases. These districts generally are located hundreds or thousands of miles from *Amici's* corporate headquarters and from *Amici's* activities accused of infringement. Venue is often based on no more than allegations that *Amici* do business in the district by placing a small percentage of their allegedly infringing products into the stream of commerce that end up in the district, or that their allegedly infringing websites can be viewed by individuals in the district. In other words, under current Federal Circuit caselaw and the realities of modern e-commerce, *Amici* can be sued in virtually any district in the country and they are sued again and again in inconvenient districts preferred by plaintiffs. *Amici* have a concrete interest in the question whether there is *any* limitation on venue in patent cases under 28 U.S.C. § 1400(b).

SUMMARY OF ARGUMENT

Amici agree with Petitioner that, as this Court has ruled repeatedly, the patent venue statute imposes real restrictions on venue, and the Federal Circuit's contrary view should be rejected. Based on their experience in the trenches, *Amici* briefly address the merits, but primarily focus on the real-world consequences of the Federal Circuit's misreading of the patent venue statute, which has led to pervasive and pernicious forum shopping.

Before turning to the consequences of the Federal Circuit's error, *Amici* note that this is not a difficult case. In the nineteenth century, Congress passed a statute to restrict venue in patent cases, 28 U.S.C. § 1400(b), to correct abuse of the general venue statute (later codified at 28 U.S.C. § 1391) in patent cases, which allowed alleged infringers to be sued almost anywhere. This Court repeatedly interpreted the patent venue statute narrowly, culminating in *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957), which held that under Section 1400(b) a domestic corporation "resides" where it is incorporated. Although *Fourco* also held that Section 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions, and is not to be supplemented by the provisions of Section 1391(c), the Federal Circuit nevertheless relied upon a later amendment to Section 1391(c) to conclude that this Court's narrow reading of Section 1400(b) in *Fourco* was no longer operative. Suffice it to say, the Federal Circuit cannot overrule this Court, and neither this Court nor Congress has ever overruled *Fourco* or materially amended Section 1400(b). Nothing more is needed to reverse the decision below.

Based upon its erroneous interpretation of Section 1400(b), the Federal Circuit has concluded that venue in patent cases is synonymous with personal jurisdiction. Combined with its embrace of an expansive theory of personal jurisdiction, the Federal Circuit effectively has held that venue in a suit against an

alleged corporate infringer is proper in almost any district in the country. Stated differently, the statute that was passed to restrict venue in patent cases has now been interpreted to apply more expansive venue rules for corporations in patent cases than in non-patent cases.

Extensive statistical evidence and academic research demonstrate that the Federal Circuit's approach has resulted in rampant forum shopping. By 2001, 29% of all patent cases were filed in only five of the 94 districts, and 44% of all patent cases were filed in 10 districts. Since that time, forum shopping has dramatically accelerated. Between 2007 and 2015, 52% of all patent cases were filed in only five districts, and 66% of all patent cases were filed in 10 districts. In 2016, 44% of all patent cases were filed in only two districts, the Eastern District of Texas and the District of Delaware, the district in which this case arose. Since 2014, a single judge in the Eastern District of Texas has handled one-quarter of all patent cases nationwide. Recent scholarly studies have concluded that the most popular patent districts compete to adopt procedures that will – and do – attract plaintiffs to their districts.

Choice of forum plays a critical role in the outcome of patent litigation. Generally in federal litigation, plaintiffs' chances of winning drop from 58% in cases in which there is no transfer to 29% in transferred litigation. In patent cases, the patent holder wins more often than not when it selects the forum of an infringement action, and the alleged infringer wins more often

than not when it selects the forum by filing a declaratory judgment action. In the most popular patent district, the Eastern District of Texas, the patent holder wins 72% of all jury trials. In the districts that hear the most patent cases, courts are less likely to transfer cases or to grant summary judgment, ratcheting up the pressure on accused infringers to settle even weak patent cases in the face of the prospect of extended, expensive litigation. If plaintiffs can sue alleged corporate infringers in any district in the country, it only stands to reason that they will choose to do so in the handful of districts in which they are most likely to prevail or to extract a settlement.

There is no substitute for properly interpreting the patent venue statute. Motions to transfer venue on convenience grounds are not an adequate workaround. Although defendants can move to transfer venue, such motions are committed to the discretion of the district court, are not decided promptly, and are often denied. Almost never appealed after a final judgment, defendants occasionally file a mandamus petition to the Federal Circuit, but mandamus petitions concerning venue are denied nearly 70% of the time. Accordingly, motions to transfer are not a stopgap solution to forum shopping.

Forum shopping harms the legal system by creating inequities in which plaintiffs often can make an outcome-determinative choice by selecting venue, and by causing inefficiencies in which cases are litigated far from the location of the parties, the alleged infringement, and the evidence. Indeed, forum shopping

in patent litigation adversely affects innovation, which is contrary to the constitutional purpose of the patent system, namely, to promote the progress of science and useful arts. Justice cannot be administered blindly and fairly if one of the parties can engage in forum shopping in order to gain an advantage. To restore justice in patent cases, the Court should resuscitate the patent venue statute by reaffirming that the Court says what it means and means what it says.

ARGUMENT

THE COURT SHOULD REITERATE ITS LONG-STANDING, NARROW INTERPRETATION OF THE PATENT VENUE STATUTE TO STOP FORUM SHOPPING.

Congress Enacted a Restrictive Patent Venue Statute. This case concerns the scope of the special patent venue statute, 28 U.S.C. § 1400(b): "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." In 1897, "Congress adopted the predecessor to § 1400(b) as a special venue statute in patent infringement actions to eliminate the 'abuses engendered' by previous venue provisions allowing such suits to be brought in any district in which the defendant could be served." *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 262 (1961) (quoting *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942)). The patent venue

statute "was designed 'to define the exact jurisdiction of the . . . courts in these matters,' and not to 'dovetail with the general [venue] provisions.'" *Schnell*, 365 U.S. at 262 (ellipsis and brackets added by Court and quoting *Stonite*, 315 U.S. at 565-66).

"As late as 1957 we have held § 1400(b) to be 'the sole and exclusive provision controlling venue in patent infringements actions.'" *Schnell*, 365 U.S. at 262 (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957)). In *Fourco*, the Court held that "28 U.S.C. § 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions, and that it is not to be supplemented by the provisions of 28 U.S.C. § 1391(c)." *Fourco*, 353 U.S. at 229. There, the Court held that a corporation "resides" where it is incorporated. *See id.* at 226.

In its last word on this subject in 1972, the Court concluded that 28 U.S.C. § 1391(d), and not 28 U.S.C. § 1400(b), dictated the venue of a patent infringement lawsuit against a *foreign* corporation that does not "reside" in any district, but noted its prior cases had concluded that for *domestic* corporations, "Congress placed patent infringement cases in a class by themselves, outside the scope of general venue legislation." *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 713 (1972). Neither the Court nor Congress has revisited the scope of Section 1400(b) since *Brunette*.

The Federal Circuit Nevertheless Eliminated the Limitations of the Patent Venue Statute. Although this Court held that Section 1400(b) should be interpreted strictly according to its plain meaning without supplementation by Section 1391(c), *see Fourco*, 353 U.S. at 229, the Federal Circuit nevertheless concluded that Congress changed "the long-standing interpretation of the patent venue statute" in 1988 when it amended the definition of "resides" in 28 U.S.C. § 1391(c). *See VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1575 (Fed. Cir. 1990). Applying that amended definition, the court concluded that "[n]ow, under amended § 1391(c) as we here apply it, venue in a patent infringement case includes any district where there would be personal jurisdiction over the corporate defendant at the time the action is commenced." *Id.* at 1583 (brackets added). In other words, the Federal Circuit concluded that the patent venue statute enacted to restrict venue in patent cases no longer imposed *any* additional restrictions on venue for corporations. *See also* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. Rev. 889, 897 (2001) (*VE Holding* "rendered superfluous the patent venue statute for corporate defendants").

The Federal Circuit likewise has adopted an expansive view of personal jurisdiction, a view that appears more expansive than that endorsed by this Court:

> Despite the Supreme Court's recent decisions questioning the "stream of commerce" theory of personal jurisdiction in product liability cases, the Federal Circuit has held that jurisdiction is proper if the accused products are sold in the forum state, whether those sales are made directly by the alleged infringer or through established distribution networks. Because most accused infringers are corporations whose products are sold nationwide, most patent plaintiffs can sue in any district.

Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 248 (2016) (footnotes omitted); *compare J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), *with Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994); *see also In re Heartland LLC*, 821 F.3d 1138, 1343-45 (Fed. Cir. 2016) (rejecting argument that *Walden v. Fiore*, 134 S. Ct. 115, 121 n.6 (2014), overruled or limited Federal Circuit's specific jurisdiction jurisprudence).

"Due to weak personal jurisdiction and venue constraints, a patentee can usually 'choose to initiate a lawsuit in virtually any federal district court.'" Klerman & Reilly, *supra*, 89 S. Cal. L. Rev. at 247 (quoting Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. Rev. 1444, 1451 (2010); *see also* Moore, *supra*, 79 N.C. L. Rev. at 901 ("With borderless commerce the norm and with lax jurisdiction and venue requirements, plaintiffs in patent cases have an unfettered choice of where to bring suit."). The problems that arise from conflating the venue and personal jurisdiction determinations are exacerbated in e-commerce patent actions accusing

a feature of a website of infringement when the website is operated by the defendant from its distant corporate headquarters and merely is available to viewers in the district (along with anyone else anywhere in the world). In such cases, the stream of commerce seemingly flows to the ends of the World Wide Web.

The Federal Circuit Overstepped its Role by Rejecting this Court's Ruling in *Fourco*. Notwithstanding this Court's holding that Section 1400(b) should be interpreted without regard to Section 1391(c), the Federal Circuit concluded that an amendment to Section 1391(c) changed everything. Even if correct – which it was not – that was the wrong approach. As this Court has made plain on numerous occasions, "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quotation and brackets omitted); *see also Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2406 n.3 (2015) (in a patent case, the Court quoted Judge Posner's observation that a prior precedent "has been severely, and as it seems to us, with all due respect, justly criticized. . . . However, we have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems.") (ellipsis added by Court and quoting *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014,

1017-18 (7th Cir. 2002)). The Federal Circuit could disagree with *Fourco*, but it could not overrule it.

The Federal Circuit's approach is even more dubious because it concluded *Fourco* no longer governed interpretation of Section 1400(b) because Congress amended a *different* statute, Section 1391(c). Even if the Court is inclined to consider legislative history, no one seriously suggests that Congress claimed to overrule *Fourco* or amend Section 1400(b) when it amended Section 1391(c). Like someone who loses a dollar in a dark alley, but looks for it on the road under a streetlamp because the light is better, this search for the meaning of Section 1400(b) in a different statute is doomed to failure. *See Fourco*, 353 U.S. at 229 (specific patent venue statute should be interpreted without regard to general venue statute); *cf. Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167, 174 (2009) ("When conducting statutory interpretation, we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.") (quotation omitted).

This Court has never questioned *Fourco* or any of its other prior rulings that venue in patent cases under Section 1400(b) is different from venue in run-of-the-mill cases under Section 1391(c), and Congress has not amended Section 1400(b) since *Fourco* was decided during the Eisenhower Administration. Up to now, Respondent has not suggested that *Fourco* and this Court's prior decisions relied upon in *Fourco* should be overruled. *Cf. City of Springfield v. Kibbe*, 480 U.S. 257, 258 (1987) (*per curiam*) ("We ordinarily will not decide

questions not raised or litigated in the lower courts.") (citations omitted). Particularly in the patent arena, the proper forum for overturning *Fourco* and expanding venue is not the Federal Circuit, or even this Court; it is Congress:

> What is more, *stare decisis* carries enhanced force when a decision, like *Brulotte* [*v. Thys Co.*, 379 U.S. 29 (1964)], interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.
>
> * * *
>
> [T]he patent laws do not turn over exceptional law-shaping authority to the courts. Accordingly, statutory *stare decisis* – in which this Court interprets and Congress decides whether to amend – retains its usual strong force.

Kimble, 135 S. Ct. at 2409, 2413 (brackets and ellipsis added and citations omitted). Because the Federal Circuit could not overrule *Fourco*, because this Court did not overrule *Fourco*, because no one has asked this Court to overrule *Fourco*, and because the proper forum to amend Section 1400(b) and thereby overrule *Fourco* is Congress, this Court should reverse the decision below without further ado.

Eliminating Patent Venue Limitations Caused Extensive Forum Shopping. Not surprisingly, eliminating the restrictions in the patent venue statute has resulted in rampant forum shopping in

which a handful of districts perceived to be plaintiff-friendly now handle the vast majority of patent lawsuits. This phenomenon is so pronounced today that academics refer to it as "forum selling" or "forum competition" in which districts compete to attract plaintiffs to file patent lawsuits in their courts. *See* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241 (2016); J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. Pa. L. Rev. 631 (2015).

Studies conducted after the Federal Circuit effectively eliminated limitations on venue in 1990 have shown increasing concentration of patent cases in a small handful of districts. In 2001, then-Professor, now-Judge, Moore conducted the first major empirical study of forum shopping in patent cases following the Federal Circuit's elimination of any limitations over venue for corporations. Examining over 10,000 patent cases resolved between 1995 and 1999, she concluded that 29% of all patent cases were filed in only five of the 94 districts, and 44% of all patent cases were filed in only 10 districts. *See* Moore, *supra*, 79 N.C. L. Rev. at 902-904. Furthermore, Professor Moore discussed the Federal Circuit's interpretation of the patent venue statute and found that "[t]he prevalence of forum shopping is a direct by-product of the existing statutory framework." *Id.* at 892. Notably, the district that currently handles over 40% of all patent cases, the Eastern District of Texas, did not even appear in the list of the 10 busiest districts in Professor Moore's study covering 1995-99, reinforcing the conclusion that forum

shopping and not some other factor explains the escalating concentration of patent cases. *See id.* at 903.

Since that time, forum shopping in patent cases has grown markedly worse. Between 2007 and 2015, 52% of all patent cases were filed in only five districts, and 66% of all patent cases were filed in only 10 districts. *See* Klerman & Reilly, *supra*, 89 S. Cal. L. Rev. at 249. By 2013, nearly half of all patent cases were filed in only two districts (the Eastern District of Texas and the District of Delaware, the district in which this case arose), neither of which is a technology or population center; and, in both districts, patent cases constituted a disproportionate share of each district's civil docket. *See* Anderson, *supra*, 163 U. Pa. L. Rev. at 632-33 (28% of civil docket in E.D. Tex. and 56% in D. Del.). Although Delaware is the state of incorporation for many companies, including some of the *Amici*, which thus "reside" in Delaware under the patent venue statute as interpreted by this Court, *see Fourco*, 353 U.S. at 326, for many other companies, Delaware is simply yet another faraway venue. *Cf. In re Heartland LLC*, 821 F.3d at 1340 (Petitioner is Indiana limited liability company).

These statistics, if anything, understate the concentration of patent cases in a small number of districts because non-practicing entities ("NPEs"), *i.e.*, patent trolls, have no real presence and thus no "home court" – accordingly, they are more likely to file suit in the districts perceived to be the most plaintiff-friendly. *See* Douglas B. Wentzel, *Stays Pending Inter Partes Review: Not In The Eastern District Of Texas*, 98 J. Pat. &

Trademark Off. Soc'y 120, 123 (2016) (96.2% of lawsuits filed in E.D. Tex. are filed by NPEs); *cf.* Council of Economic Advisors, *The Patent Litigation Landscape: Recent Research and Developments*, 3 (March 2016) (NPEs' share of patent litigation has increased from under 30% in 2009 to over 60% in 2014). And when these entities do file suit, they are more likely to sue multiple defendants in a single lawsuit (or, more recently, file multiple lawsuits against numerous defendants under the same patent, which are then consolidated for pre-trial purposes). *See* Greg Reilly, *Aggregating Defendants*, 41 Fla. St. U. L. Rev. 1011, 1024 (2014) (twice as many defendants sued per case in E.D. Tex. than national average); Klerman & Reilly, *supra*, 89 S. Cal. L. Rev. at 249 (in 2010, 10% of the patent cases were filed in E.D. Tex., but 25% of all patent defendants were sued there). "In 2007, about 20 percent of all patent infringement defendants were named in cases filed in the Eastern District of Texas, and this percentage increased to almost 50 percent in 2015." GAO Report, *Patent Office Should Define Quality, Reassess Incentives and Improve Clarity*, 16 (June 2016); *see also* Council of Economic Advisors, *supra*, at 4 ("NPEs were overwhelmingly likely to file suit in the Eastern District of Texas or the District of Delaware, and these two courts together accounted for 70 percent of cases filed by NPEs in 2014.").

In 2015, over 53% of all patent cases were filed in only two districts, the Eastern District of Texas (44.2%) and the District of Delaware (9.4%), and 67% of all patent cases were filed in only five districts. *See* Docket

Navigator, *2015 Year in Review*, 18 (2016). "In fact, one judge – Judge Rodney Gilstrap of Marshall, Texas – saw almost one quarter of all patent case filings nationwide [since 2014], more than all the federal judges in California, New York, and Florida combined." Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 Stan. Tech. L. Rev. 1, 6 (2017) (brackets added and footnote omitted); *see also* Frederick L. Cottrell III, *et al.*, *Nonpracticing Entities Come to Delaware*, Federal Lawyer, 63 (Oct. 2013) (each judge in D. Del. has 400-500 patent cases). In 2016, the concentration of patent filings decreased only slightly – over 44% of all new patent cases were filed in the Eastern District of Texas (35.4%) and the District of Delaware (9.2%). Kevin Benton, *New Patent Filings Down in 2016, Lowest Since 2011: Report* (2017) (available at https://www.law360.com/articles/850061/new-patent-filings-down-in-20).

Because the Federal Circuit eliminated restrictions on venue over corporations in the patent venue statute, districts can – and do – compete to attract plaintiffs to file patent lawsuits in their districts. *See* Anderson, *supra*, 163 U. Pa. L. Rev. at 635 ("maintaining trial management practices in a predictable manner that favors a particular type of litigant (almost always plaintiffs) allows district courts to compete for the business of litigation"); Klerman & Reilly, *supra*, 89 S. Cal. L. Rev. at 243 (judges in E.D. Tex. "have sought to attract patent plaintiffs to their district and have

distorted the rules and practices relating to case assignment, joinder, discovery, transfer, and summary judgment in a pro-patentee (plaintiff) direction"); Cottrell, *supra*, Federal Lawyer at 64 (D. Del. is the second most favorable jurisdiction for patent plaintiffs based on case management approach). In a world in which a patent holder can file a patent case against any defendant in virtually any district, it stands to reason that such cases would be filed in the districts most hospitable to plaintiffs.

Motions To Transfer Are Not an Adequate Substitute for Proper Interpretation of the Patent Venue Statute. Although defendants can move to transfer venue pursuant to 28 U.S.C. § 1404(a), such motions offer the wrong relief too late, placing the burden on the accused infringer to show why convenience favors transfer, rather than on the patent holder to show that the chosen venue is proper. Although such transfer motions obviously are filed only by defendants that do not "reside" in the district under *Fourco*'s interpretation of Section 1400(b), transfer motions do not solve the problems caused by the Federal Circuit's effective erasure of Section 1400(b) for numerous reasons.

First, transfer motions are committed to the discretion of the district court. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-30 (1988). *Second*, "the most popular current destinations for patent plaintiffs – the Eastern District of Texas and the District of Delaware – both have reputations as districts that are

unlikely to grant transfer motions." Anderson, *supra*, 163 U. Pa. L. Rev. at 676 (footnote omitted).

Third, courts are slow to act on motions to transfer. *See* Professors' Letter Supporting Venue Reform, at 2 (July 12, 2016) (available at http://patentlyo.com/patent/2016/07/professors-patent-reform.html) ("The average grant of transfer in [E.D. Tex.] took over a year (490 days), and the average denial of a transfer motion took 340 days, meaning that even cases that are ultimately transferred remain pending in the district for nearly a year.") (brackets added and footnote omitted). Because motions to transfer (and motions to dismiss, for that matter) do not automatically stay discovery or litigation, defendants routinely settle their cases to avoid the high cost of patent litigation rather than wait a year or more for a ruling on even meritorious motions to transfer or dismiss. *See* Love & Yoon, *supra*, 20 Stan. Tech. L. Rev. at 21-24; *cf.* Klerman & Reilly, *supra*, 89 S. Cal. L. Rev. at 268-70 (onerous and asymmetrical discovery requirements imposed on defendants).

Fourth, defendants rarely, if ever, challenge venue or denial of motions to transfer venue after entry of final judgment in patent cases (and obviously cannot appeal if they settle instead of incurring the enormous cost and risk of litigating in a hostile or remote district). Rather, on occasion, defendants will challenge the denial of a motion to transfer by filing a mandamus petition to the Federal Circuit, where the heightened standard for obtaining extraordinary relief further enhances the difficulty of obtaining a reversal of a discretionary determination.

Finally, if the motion to transfer venue is denied, the Federal Circuit is unlikely to overturn that decision in a mandamus petition. Overall, the Federal Circuit grants only about 10% of the mandamus petitions it considers. *See* Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 Indiana L. Rev. 343, 345-46 (2012). Before 2008, the Federal Circuit had never granted a mandamus petition to overturn a decision denying transfer. *See* Anderson, *supra*, 163 U. Pa. L. Rev. at 676. Following *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008), the Federal Circuit found that the district court (usually the Eastern District of Texas) had clearly abused its discretion in denying a motion to transfer in only 11 cases by 2012, *see* Gugliuzza, *supra*, at 346 (footnote omitted), and since 2012, in reported cases, the Federal Circuit has only granted five such petitions (and none in the last two years). *See In re TOA Techs., Inc.*, 543 Fed. Appx. 1006 (Fed. Cir. Oct. 3, 2013); *In re Toyota Motor Corp.*, 747 F.3d 1338 (Fed. Cir. 2014); *In re WMS Gaming Inc.*, 564 Fed. Appx. 579 (Fed. Cir. Apr. 23, 2014); *In re Nintendo of Am.*, 756 F.3d 1363 (Fed. Cir. 2014); *In re Apple, Inc.*, 581 Fed. Appx. 886 (Fed. Cir. Sept. 11, 2014). In sum, the Federal Circuit has only granted 17 of 54 (31%) of the mandamus petitions concerning denial of venue since 2008.

Stated differently, motions to transfer are decided slowly, if at all; when they are decided, they are usually denied; and in the minority of cases in which the denials of the motions to transfer are challenged in the Federal Circuit, those mandamus petitions are usually

denied. In short, motions to transfer – vested in the discretion of the trial court – are no substitute for a proper application of the patent venue statute, 28 U.S.C. § 1400(b), which was enacted to limit jurisdiction in patent cases.

Forum Shopping Undermines Justice and the Appearance of Justice. "Venue is worth fighting over because outcome often turns on forum." Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evils of Forum Shopping*, 80 Cornell L. Rev. 1507, 1508 (1995). In their groundbreaking study of over 2.8 million federal civil lawsuits, Professors Clermont and Eisenberg found that plaintiffs' chances of winning drop from 58% in cases in which there is no transfer to 29% in transferred litigation. *Id.* at 1512. In her study of over 10,000 patent cases, Professor Moore found that the patent holder wins 58% of the time when it selects the forum, but wins only 44% of the time in a declaratory judgment action when the alleged infringer selects the forum. *See* Moore, *supra*, 79 N.C. L. Rev. at 921.

The President's Council of Economic Advisors recently surveyed the research and found that patent litigation today is plagued by parties seeking to game the system through forum shopping:

> This type of "forum shopping" is a notable feature of the current patent litigation environment. It is not surprising that litigants are motivated to act in this way; litigation success rates vary widely across district courts, as do damages and time to trial. The uncertainty

> around litigation costs and outcomes may lead defendants to settle quickly to avoid high costs or unfavorable decisions, even when the suit has little merit.

Council of Economic Advisors, *supra*, at 4 (citation omitted).

Forum shopping has an even greater impact when cases go to trial. In the most popular patent district, the Eastern District of Texas, the patent holder wins 72% of all jury trials. *See* Klerman & Reilly, *supra*, 89 S. Cal. L. Rev. at 254. "Perhaps nothing increases the patentee's chances of a favorable resolution more than making it to trial." *Id.* at 251. It is not surprising, then, that plaintiffs select venues that favor trial over summary judgment:

> [J]udges in the Eastern District of Texas grant summary judgment at less than one-quarter the rate of judges in other districts. Only Delaware even approaches the Eastern District of Texas, and its summary judgment rate is twice that of the Eastern District of Texas.

Id. (brackets added); *see also* Anderson, *supra*, 163 U. Pa. L. Rev. at 655 (judges in D. Del. "grant summary judgment motions rarely") (footnote omitted).

Similarly, motions to stay pending *inter partes* review are granted 62% of the time nationally (and 80.4% of the time nationally when the plaintiff is a non-practicing entity), but only 15.6% of the time in the Eastern District of Texas. *See* Wentzel, *supra*, 98 J.

Pat. & Trademark Off. Soc'y at 124. "Perhaps deterred by this low success rate, fewer stay motions were made in the Eastern District [of Texas] (1% of total 2013-2014 case filings) than in the District of Delaware (2.2%), . . . [and] Northern District of California (11%)." Klerman & Reilly, *supra*, 89 S. Cal. L. Rev. at 264 (ellipsis and brackets added). "As a result, the Eastern District's stay rate in 2013-2014 was only 0.4% of filed cases, significantly lower than districts like the District of Delaware (1.3%) and Northern District of California (6.5%)." *Id.* (footnote omitted).

The *prospect* of trial may be enough for a patentee to obtain a favorable resolution through settlement. *See* Anderson, *supra*, 163 U. Pa. L. Rev. at 655-56 ("The infrequency of obtaining summary judgment increases costs for defendants, increases the odds of getting to trial, and incentivizes defendants to settle out of fear of potentially large damage awards.") (footnote omitted); *accord* Cottrell, *supra*, Federal Lawyer at 64. Beyond the risk of loss at trial in a plaintiff-friendly forum is the enormous cost of discovery and litigation in a far-off venue:

> By bringing suit in far-flung, perceivably-plaintiff-friendly "magnet jurisdictions," nuisance plaintiffs can satisfy the minimum Constitutional venue requirements while subjecting defendants to the cost and inconvenience of having to litigate in a distant location.

Ranganath Sudarshan, *Nuisance-Value Patent Suits: An Economic Model and Proposal*, 25 Santa Clara High Tech. L.J. 159, 165 (2008) (footnote omitted); *see*

also id. at 172 ("Perhaps the greatest factor contributing to the existence of nuisance-value patent suits is the high cost of patent litigation."). This conclusion has been empirically demonstrated in patent litigation by the Federal Trade Commission ("FTC"), which found, using its subpoena power, that non-practicing entities routinely price patent litigation settlements at less than $300,000, which not surprisingly is below the lower range of early-stage litigation costs of defending a patent infringement suit. *See* FTC, *Patent Assertion Entity Activity*, 88-90 (2016); *see also id.* (30% of litigation settlements are less than $50,000). Because 77% of such settlements "fell below a *de facto* benchmark for the nuisance cost of litigation[,]" *i.e.*, less than $300,000, "[t]his suggests that discovery costs, and not the technological value of the patent, may set the benchmark for settlement value" in such cases. *Id.* at 10 (brackets added).

In examining the most popular patent jurisdiction resulting from the Federal Circuit's refusal to apply any meaningful restrictions on venue, scholars have concluded "that the driving force behind the jurisdiction's popularity is the combination of plaintiffs' ability to impose early, broad discovery obligations on accused infringers and defendants' inability to obtain an early procedural or substantive victory through motion practice." Love & Yoon, *supra*, 20 Stan. Tech. L. Rev. at 22-24.

> Accordingly, restricting patentees' ability to file suit in East Texas in the first place may be the *single most effective reform* available to

> Congress and the courts to limit the use of forum selection as a weapon to impose increased legal costs on companies sued for patent infringement.

Id. at 6 (emphasis added).

Suffice it to say, commentators uniformly condemn forum shopping in patent litigation. "Forum shopping can be harmful to the legal system by distorting the substantive law, by showcasing the inequities of granting plaintiffs an often outcome-determinative choice among many district courts, and by causing numerous economic inefficiencies, including inconveniences to the parties." Fromer, *supra*, 85 N.Y.U. L. Rev. at 1445. Forum shopping, and the resulting rise of patent litigation with little substantive merit in a handful of jurisdictions, has reduced innovation, and may adversely affect entrepreneurship. *See* Council of Economic Advisors, *supra*, at 1, 5, 7. This, of course, is the antithesis of the purpose of the patent system, namely, to promote the progress of science and useful arts. *See* U.S. Const. art. I, § 8, cl. 8.

In addition to its adverse effect on justice, forum shopping adversely affects the appearance of justice: "Forum shopping conjures negative images of a manipulable legal system in which justice is not imparted fairly or predictably." Moore, *supra*, 79 N.C. L. Rev. at 892; *see also id.* at 924-30 (discussing the "evils" of forum shopping, namely, inequity and inefficiency).

"Forum shopping has fundamentally altered the landscape of patent litigation in ways detrimental to

the patent system as a whole." Anderson, *supra*, 163 U. Pa. L. Rev. at 637 (footnote omitted). "Court competition creates even more problems, ranging from reduced trust in the judicial process to uneven playing fields for litigants." *Id*. By reviving the currently moribund patent venue statute, 28 U.S.C. § 1400(b), in accord with its express language and original intent, the Court could restore trust in the judicial process and reinstate a level playing field. And, perhaps, once again, the patent system could promote the progress of science and useful arts.

CONCLUSION

Amici Curiae respectfully submit that the Court should reverse the decision below.

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February 6, 2017